Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JAN FRANCIS BECKER,

Petitioner,

vs.

DOROTHY MARIE DAWSON BECKER, THE HONORABLE JUDGE THOMAS D. WHITE, and THE HOLMES COUNTY CHILD SUPPORT ENFORCEMENT AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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24 AP

QUESTION PRESENTED FOR REVIEW

1. Whether the Court erred in failing to require a Court of Common Pleas Judge to disqualify himself from presiding over the Petitioner's Domestic Relations matter when the Petitioner had named the Common Pleas Court Judge as a Defendant in another matter in Federal Court.

2. Whether the Court erred in failing to interpret Judicial Conduct Canon 3 (E) (a) as requiring a Judge's disqualification from a domestic relations matter when the Judge was a Defendant in a civil lawsuit in which one of the parties to the domestic relations matter was the Plaintiff.

3. Whether the Court erred in failing to interpret the Due Process Clauses of the Fourteenth Amendments as requiring a domestic relations Judge's disqualification when the Judge was named as a Defendant in another lawsuit by one of the parties to the domestic relations matter.

4. Whether the denial of an affidavit for disqualification without a hearing is a denial of procedural due process under the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner Jan Francis Becker was the Defendant in the Court of Common Please and the Petitioner in the Affidavit for Recusal filed in the Ohio Supreme Court.

Dorothy Marie Dawson Becker was the Plaintiff in the Court of Common Pleas.

The Holmes County Department of Children and Family Services is an agency responsible for enforcement of child support obligations and is a party to every action in Ohio in which there is Child Support. The Department was a third party Plaintiff in the Court of Common Pleas.

The Honorable Judge Thomas D. White is the Judge assigned to the case in the Holmes County Court of Common Pleas. An Affidavit of Disqualification was filed in the Ohio Supreme Court requesting Judge White's disqualification.

Veronica Becker is the mother of Jan Becker and requested and received grandparent visitation. She was a third party Plaintiff in the Court of Common Pleas.

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Respondents.

OPINIONS BELOW

The opinion of Justice Moyer, Chief Justice of the Ohio Supreme Court, in Ohio Supreme Court Case Number, 99-AP-091, Dorothy Marie Dawson Becker v. Jan Francis Becker, was dated October 14, 1999 and was filed October 18, 1999. The text of the opinion is attached as Appendix A

STATEMENT OF JURISDICTION

The judgment of the Ohio Supreme Court was entered on October 14, 1999. United States Supreme Court Rule 13 allows 90 days after entry of a judgment for filing of the Petition for a Writ of Certiorari. The 90 days expires on January 11, 2000. The jurisdiction of the Court is invoked by 28 USC §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment Fourteen, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Judicial Conduct, Canon 3(E) (10)(a):
A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
(a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings.

Ohio Revised Code §2701.03:

(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification

with the clerk of the supreme court in accordance with division (B) of this section.

(B)An affidavit of disqualification filed under section 2101.39 or 2501.13 of the Revised Code or division (A) of this section shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit, files against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

(3) A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel;

(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

(C)(1) Except as provided in division (C)(2) of this section, when an affidavit of disqualification is presented to the clerk of the supreme court for filing under division (B) of this section, all of the following apply:

(a) The clerk of the supreme court shall accept the affidavit for filing and shall forward the affidavit to the chief justice of the supreme court.

(b) The supreme court shall send notice of the filing of the affidavit to the probate court served by the judge if the affidavit is filed against a probate court judge, to the clerk of the court of appeals served by the judge if the affidavit is filed against a judge of a court of appeals, or to the clerk of the court of common pleas served by the judge if the affidavit is filed against a judge of a court of common pleas.

(c) Upon receipt of the notice under division (C) (1)(b) of this section, the probate court, the clerk of the court of appeals, or the clerk of the court of common pleas shall enter the fact of the filing of the affidavit on the docket of the probate court, the docket of the court of appeals, or the docket in the proceeding in the

court of common pleas.

(2) The clerk of the supreme court shall not accept an affidavit of disqualification presented for filing division (B) of this section if it is not timely presented for filing or does not satisfy the requirements of divisions (B)(2), (3), and (4) of this section.

(D)(1) Except as provided in divisions (D)(2) to (4) of this section, if the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, the affidavit. deprives the judge against whom the affidavit was filed of any authority to preside in the proceeding until the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, rules on the affidavit pursuant to division (E) of this section.

(2) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may do any of the following that is applicable:

(a) If, based on the scheduled hearing date, the affidavit was not timely filed, the judge may preside in the proceeding.

(b) If the proceeding is a domestic relations proceeding, the judge may issue any temporary order relating to spousal support

pendente lite and the support, maintenance, and allocation of parental rights and responsibilities for the care of children.

(c) If the proceeding pertains to a complaint brought pursuant to Chapter 2151 of the Revised Code, the judge may issue any

temporary order pertaining to the relation and conduct of any other person toward a child who is the subject of a complaint as the interest and welfare of the child may require.

(3) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may determine a matter that does not affect a substantive right of any of the parties.

(4) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, if the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, denies the affidavit of disqualification pursuant to division (E) of this section, and if, after the denial, a second or subsequent affidavit of disqualification regarding the same judge and the same proceeding is filed by the same party who filed or on whose behalf was filed the affidavit that was denied or by counsel for the same party who filed or on whose behalf was filed the affidavit that was denied, the judge

against whom the second or subsequent affidavit is filed may preside in the proceeding prior to the ruling of the chief justice of the supreme court, or a justice designated by the chief justice, on the second or subsequent affidavit.

(E) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section and if the chief justice of the supreme court, or any justices of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit does not exist, the chief justice or the designated justice shall issue an entry denying the affidavit of disqualification. If the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the chief justice or the designated justice shall issue an entry that disqualifies that judge from presiding in the proceeding and either order that the proceeding be assigned to another judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge.

STATEMENT OF THE CASE

1. Proceedings Below

On April 14,1998, Dorothy Becker filed for divorce from her husband, Jan Francis Becker, in the Holmes County Court of Common Pleas. Judge Thomas White presided over the divorce proceedings and granted the divorce.

2. Statement of Facts

Jan Becker has a long history of legal problems in Holmes County. Some of the legal issues involve his children and some involve his property and his farm animals.

As a result of his legal problems, Mr. Becker has believed it necessary to bring several pro se actions against several government officials to seek redress for his legal problems. Judge White has been named as a defendant in many of Mr. Becker's Complaints and other suits. Mr. Becker has filed legal actions against Judge White from the beginning of his legal problems. The lawsuits continued even after Mr. Becker's divorce had been granted by Judge White.

During the course of the domestic relations matter, Mr. Becker has been found in contempt by Judge White and has been prosecuted for non-payment of child support. During the hearing for non-payment of child support, Mr. Becker's counsel requested that the Magistrate, Jeffery Ginsburg, recuse himself as he was previous counsel for Dorothy Becker. Magistrate Ginsburg recused himself and Judge White continued the proceeding.

Upon Judge White's presiding over the case, Defendant's counsel requested that Judge White recuse himself as the Defendant had sued Judge White and because there was presently an appeal pending before the United States Court of Appeals for the Sixth Circuit in which Judge White had been named a Defendant. Judge White refused the recusal.

On or about October 8, 1999, the Defendant filed for a Modification of Visitation in the Holmes County Court of Common Pleas and simultaneously filed an affidavit of recusal in the Ohio Supreme Court. The affidavit requested Judge White's recusal as the civil suit created a personal bias against the Defendant.

3. Ohio Supreme Court Opinion

Justice Moyer of the Ohio Supreme Court denied the affidavit of disqualification in Supreme Court Case Number 99-AP-091 in a decision of October 14, 1999 which was filed on October 18, 1999. See Appendix A.

REASONS FOR GRANTING WRIT

I. This issue is new to the United States Supreme Court

This issue has not been before the United States Supreme Court. Similar issues regarding recusal of a judge have been brought before the court, but none have dealt with whether the filing of a suit against a judge creates such a bias that it denies due process of law. The lower court has decided the issue in conflict with the Fourteenth Amendment to the United States Constitution as indicated in the previous decisions of the United States Supreme Court in Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).

II. Ohio Has Set a Distinguishable Precedence

The Ohio Supreme Court Code of Judicial Conduct, Canon 3(E) (10)(a) which states:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings.

The issue of whether the pendancy of a civil suit against a Judge requires that Judge's recusal under the Canon 3(E) has been discussed several times in Ohio and other jurisdictions. Ohio has continually denied a party's request for recusal of a Judge when that Judge is a litigant in a lawsuit brought by a party before the Judge.

Ohio's decisions have been based on the precedence set by Smith v. Smith, 564 P.2d 1266, 115 Ariz. 299 (1977) which was cited by Justice Moyer of the Ohio Supreme Court in In re Disqualification of Hunter, 522 N.E.2d 461 at 462, 36 Ohio St.3d 607 at 608 (1988).

In both Smith v. Smith and In re Disqualification of Hunter, the party requesting recusal sued the Judge after the party's case before the Judge had been assigned to the Judge. In both cases, the party requesting recusal had filed the case against the Judge simply to obtain the Judge's recusal. The facts present in Smith v. Smith and In re Disqualification of Hunter are not present in the instant case.

In this matter, the party requesting the Judge's recusal filed the pending action against the Judge after the divorce action had concluded, but before any post judgment relief had been filed. The suit was not filed against the Judge to obtain the Judge's recusal. The suit was filed against the Judge because the pro se litigant believed he was the subject of injustice resulting from matters previously before the Judge. As stated in Smith v. Smith, the matter creating the bias or prejudice must be based on an extra-judicial source and not from participation in the instant case. 564 P.2d at 1270. The complaints against Judge White arise from an extra-judicial source, previous litigation unrelated to the instant case.

The line of Ohio cases following In re Disqualification of Hunter have continued to hold that a party cannot obtain recusal of a Judge simply by creating an opportunity

for bias after litigation before the Judge has begun. See In re Disqualification of Kilpatrick, 47 Ohio St.3d 605, 546 N.E.2d 929 (1989) holding that a party cannot seek a Judge's recusal after having filed a disciplinary action against the Judge; State v. Stuber, 71 Ohio App.3d 86, 593 N.E.2d 48 (1990) holding that a party could not seek recusal of Appellate Court Judges after suing the Judges assigned to his case; State v. Blankenship, 115 Ohio App.3d 512, 685 N.E.2d 831 (1996) holding that a party cannot seek a Judge's recusal after filing a disciplinary action against the Judge.

These cases all followed the same line of precedence and had similar facts. The party seeking the Judge's recusal filed suit or a disciplinary action against the Judge after the party was already in front of the Judge. The previous Ohio cases, however, did not consider whether the basis of bias was an extra-judicial source. The previous cases did not involve an extra-judicial source as the source of bias was the suing of the judge based on actions involving the very matter for which the party appeared before the judge. This is not the case in the instant proceeding. In this proceeding, the party is seeking the Judge's recusal because the party sued the Judge prior to being before the Judge. This distinguishes this matter from the previous line of precedence set in the Ohio Supreme Court. The Ohio Supreme Court cannot simply apply the precedence of In re Disqualification of Hunter without looking more deeply at the facts.

A closer look at the facts reveals that the animosity between the parties goes further back than the instant proceeding. It is apparent to this counsel that some of the causes of action brought by Mr. Becker were frequent and may even be considered frivolous. The potential frivolous nature of the actions does not diminish the bias which may arise in the mind of the Judge.

Especially because the actions filed against the Judge may be construed as frivolous, the Judge is more likely to have some bias against Mr. Becker. The Ohio Supreme Court's failure to see such bias and its refusal to order
recusal amounts to a violation of the Due Process rights of Mr. Becker.

III. Denial of Disqualification as a Violation of Due Process

In Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986), the United States Supreme Court held that it violated the Due Process Clause of the Fourteenth Amendment for a Justice of the Alabama Supreme Court to fail to recuse himself from a matter that was similar to a matter in which the Justice was a party. The Justice was deemed biased as the matter the Justice was deciding was creating precedence in the Justice's favor. In finding for recusal, the Court indicated that it "certainly violated the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Id. at 822, citing Tumey v. Ohio, 273 U.S. 510 at 523 (1927).

In the instant matter, the Judge did have a direct, substantial, personal, pecuniary interest in the case. The Judge has been made subject to several lawsuits by the Defendant. A conclusion against the Defendant is in the Judge's best interest as it could give the Judge a feeling of vindication. Because of the history of animosity between the parties, the Judge is likely to set aside reason and rule based on emotion and outside the bounds of the law. The history of ill will between the parties would "offer a possible temptation

to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." Aetna Life Ins. Co., at 822, citing Ward v. Village of Monroeville, 409 U.S. 57 at 60 (1972).

IV. The Denial of an Affidavit of Disqualification Without a Hearing is a Denial of Due Process

Under Ohio Revised Code §2701.03, a party may request disqualification of a judge who is interested in a proceeding. The statute has no procedure for a hearing on the issue of disqualification. The party seeking recusal files an affidavit with the Supreme Court and the Chief Justice, or another assigned Justice, makes a decision based on the affidavit.

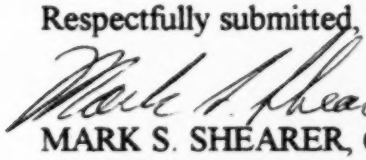
It is a fundamental principle established by the Fourteenth Amendment Due Process Clause, that a party is entitled to a hearing when that party may be subject to loss of life, liberty or property. To be subject to a hearing before a biased tribunal is a denial of liberty and may result in the denial of property. Because the issue of recusal may result in the denial of liberty or property, and even in some circumstances, denial of life, a hearing must be given on the issue of recusal. Because the Ohio procedures for an affidavit of disqualification do not require a hearing, the Fourteenth Amendment requirements of due process have not been given to Mr. Becker and the decision of the Ohio Supreme Court must be reversed and the matter remanded for further proceedings.

CONCLUSION

The United States Supreme Court may review the decision of a State Supreme Court when the State Supreme Court's decision is contrary to the United States Constitution. The decision of the Ohio Supreme Court in this matter is inconsistent with the Fourteenth Amendment to the United States Constitution as the decision denies due process of law.

For this and all the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,



MARK S. SHEARER, *Counsel of Record*
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Attorney for Petitioner

NOT FOR PUBLICATION

IN THE SUPREME COURT OF OHIO

DOROTHY MARIE DAWSON BECKER	:	CASE NO. 98 DR 039
	:	HOLMES COUNTY
PLAINTIFF	:	
	:	
V.	:	
	:	S.C. NO. 99 AP-091
JAN FRANCIS BECKER	:	
	:	
DEFENDANT:		ENTRY

The affidavit of disqualification filed by defendant Jan Francis Becker seeks the disqualification of Judge Thomas D. White from further proceedings regarding the above-captioned case. Affiant alleges that Judge White is biased and prejudiced against him because he has filed a civil lawsuit in federal court against Judge White.

The mere fact that a judge may be an adverse party in another unrelated case does not require the judge's disqualification. In re Disqualification of Hunter (1988), 36 Ohio St.3d 607.

For this reason, the affidavit of disqualification is found not well-taken and denied. The case shall proceed before Judge White.

Dated this 14th day of October, 1999.
THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

Dorothy Marie Dawson Becker, CASE NO. 98-DR-039

Plainitff,

Vs

Jan Becker,

Defendant.

Journalized: Journal 143 Page 605

JOURNAL AND DOCKET ENTRY:

This cause came on for hearing on September 17, 1999, on Holmes County Child Support Enforcement Agency's (C.S.E.A.'s) June 17, 1999 motion to cite for contempt and lump sum judgment. Attorney Jewart appeared on behalf of the C.S.E.A. Defendant appeared with his counsel Mark S. Shearer.

Counsel for defendant made a renewed request to disqualify Judge White or continue the hearing. Said request was denied.

During the hearing, the parties reachd an agreement. Said agreement was read into the record. Attorney Jewart shall submit a journal entry reciting the conditions of the agreement and ruling by the Court within fourteen days.

SO ORDERED,

_____/s/_____
THOMAS D. WHITE, JUDGE

DATED: Sep. 17, 1999